No. 85-1411

IN THE

Supreme Court of The United States

OCTOBER TERM 1985

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

ROBERT BLAKE McCALLUM,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED

The question presented is whether an accused's Sixth Amendment rights to confront and to present a defense are superior to the Federal Rules of Evidence.

LIST OF PARTIES

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
A. EXCLUSION OF EVIDENCE SHOWING BIAS	6
B. EXCLUSION OF EVIDENCE SHOWING THAT PETITIONER HAD NOT BEEN TERMINATED	7
C. EXCLUSION OF DEFENSIVE TESTIMONY	9
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF AUTHORITIES

Cases *Page*

Alford v. United States, 282 U.S. 687 (1931) 5

Chambers v. Mississippi, 410 U.S. 284 (1973) 5

Davis v. Alaska, 415 U.S. 308 (1974) 5, 11, 19

Delaware v. Van Arsdale, _ U.S. _, 105 S.Ct. 465 ... 6

Delaware v. Van Arsdale, 33 Cr.L. 4167 6

In re Oliver, 333 U.S. 257 (1948) 4, 8, 9

United States v. Abel, _ U.S. _, 105 S.Ct. 465 (1984) 6

United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976) 4

United States v. Robinson, 530 F.2d 1076 (D.C.Cir. 1976) 7

United States v. Wasman, 641 F.2d 326 (5th Cir. 1981) 7

Van Arsdale v. State, 486 A.2d 1 (Del.S.Ct. 1984) 8

Villaroman v. United States, 184 F.2d 261 (D.C. Cir. 1950) 7

Washington v. Texas, 388 U.S. 14 (1967) 4

Constitutional Provisions:

U.S. Const., amend. VI 4

Statutes:

18 U.S.C. §1001 ..... 3, 8

28 U.S.C. §1254 2

Federal Rules of Evidence:

Rule 401 3

Rule 402 3

Rule 403 ..... 3, 4

No. 85-_____

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OCTOBER TERM 1985

ROBERT BLAKE McCALLUM,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, ROBERT BLAKE McCALLUM, respectfully prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the circuit court of appeals was not published, and the cause is not yet reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The opinion affirming petitioner's conviction was entered on December 23, 1985. A petition for rehearing was denied on January 23, 1986. A copy of the order denying the petition for rehearing is set forth in Appendix B.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In May 4, 1982, Petitioner and Allied Fidelity Insurance Company (Allied) entered into a contractual relationship in which petitioner would act as an agent for Allied. Petitioner received a federal power of attorney which contained the following language:

> "Know all men by these presents: That Allied . . . pursuant to the following duly adopted By-laws by its Board of Directors which are now in full force and effect, to wit:
>
> > The President shall have power and authority to appoint Attorneys-In-Fact, and authorize them to execute, on behalf of the company, bonds . . ., and he may at any time in his judgment remove any such appointees and revoke the authority given to them."

On May 6, 1982, Allied sought to terminate the relationship when an Allied vice-president mailed a termination letter to petitioner. Also, an Allied regional manager

orally notified petitioner that he could no longer execute bail bonds with Allied as surety. Petitioner sought the advice of counsel, who told him that pursuant to the language in the general power quoted above, the president of the company was the only person who could grant or revoke the contract, and that petitioner was still an Allied agent until he was revoked by the president of Allied. On June 1, 1982, the general power was filed with the United States District Clerk for the Northern District of Texas. Subsequently, individual powers of attorney showing appellant as an agent for Allied were attached to twenty seven immigration appearance bonds (Form I352) which were filed with the Immigration and Naturalization Service (INS) to secure the release of persons charged with immigration violations. The bonds were filed from June through August 27, 1982.

Allied contended that petitioner had been terminated in May of 1982 and that he was not authorized to act as their agent. The government brought a civil suit against Allied to collect on the INS bonds that were forfeited and filed a twenty-seven count indictment against the petitioner, alleging that he made false statements in matters concerning the INS, contrary to 18 U.S.C. §1001.

At petitioner's trial, he sought to introduce evidence and testimony of the following:

1. that Allied and the INS were involved in civil litigation over the bonds which were the subject matter in the criminal case;

2. that pursuant to Allied's own corporate by-laws, the president of Allied was the only person who could terminate petitioner; and

3. that petitioner's counsel continued to give advice that the petitioner was entitled to act as Allied's agent until he was terminated by the president of Allied through late August, 1982.

The trial court excluded the evidence concerning the civil litigation under Rule 403, Federal Rules of Evidence (confusing to the jury). He excluded the evidence concerning the actual authority of Allied to terminate as being irrelevant, presumably under Rules 401 and 402 of the Federal Rules of Evidence. The trial court excluded the testimony concerning continued advice as being cumulative to counsel's testimony that he gave the same advice in May, 1982, presumedly under Rule 403 of the Federal Rules of Evidence. The circuit court of appeals affirmed on each of the trial court's rulings, holding that there was no abuse of the trial court's discretion in ruling on evidentiary matters.

REASONS FOR GRANTING THE WRIT

It is petitioner's contention in this petition that an accused's Sixth Amendment rights to confront the government's allegations and to present a defense are superior to the Federal Rules of Evidence. In the present case, the trial court, by use of Rule 403,[1] was permitted to emasculate the petitioner's defense, contrary to the clear dictates of the Constitution.

The Sixth Amendment to the United States Constitution provides the accused in a criminal case with the right to compulsory process to call witnesses in the accused's favor. U.S. Const., amend. VI. The right to compulsory process is implicated when an accused is barred from presenting witnesses to testify on his behalf. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *United States v.*

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[1] Federal Rules of Evidence, Rule 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Melchor Moreno, 536 F.2d 1042, 1046 (5th Cir. 1976). As stated in *In re Oliver*, 333 U.S. 257, at 273 (1948):

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967), the Supreme Court spelled out the significance of the Sixth Amendment right of the accused to have compulsory process for obtaining witnesses in his favor. The Court noted that the right to offer testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense. The Sixth Amendment's policy is reinforced by the broad requirement of fundamental fairness that the due process clause of both the Fifth and Fourteenth Amendments imposes. In *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), the Court said, in the course of a discussion of due process: Few rights are more fundamental than that of an accused to present witnesses in his own defense.

In *Davis v. Alaska*, 415 U.S. 308, 320-321 (1974), cross-examination of the government's main witness had been curtailed by a state evidentiary rule. This Court reversed, noting that procedural rules must fall "before the right of petitioner to seek out the truth in the process of defending himself." See also *Alford v. United States*, 282 U.S. 687, 693-694 (1931), where an accused's Sixth Amendment right of confrontation was held superior to a witness's perceived right to be protected from disclosure of his criminal record.

A. Exclusion of Evidence Showing Bias

Petitioner presented two defenses, or at least tried to present two defenses. First, that he did not willfully make a false statement because he relied upon the advice of counsel, and second, that he had in fact not been terminated. In presenting the second defense, he tried to impeach five Allied witnesses, each of whom testified that petitioner was terminated in May, 1982. Petitioner sought to impeach the five witnesses from Allied by showing that the INS and Allied were involved in litigation over the bonds which were the subject matter in this criminal case. If Allied had not lawfully terminated petitioner, then Allied's position in the lawsuit would be affected. Therefore, the existence of the Allied — INS lawsuit gave the Allied employees a motive to fabricate their testimony against appellant in this criminal case.

"The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. 3A J. Wigmore, Evidence, §940, p. 778 (Chadbourn Rev. 1970)," *Davis v. Alaska*, 415 U.S. 308, 317 (1974). As stated by Mr. Justice Rehnquist in *United States v. Abel*, _U.S. _, 105 S.Ct. 465, 468 (1984), "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony."

Petitioner directs this Court to *Delaware v. Van Arsdale*, _U.S. _, 105 S.Ct. 3552 (#84-1279) in which this Court heard argument on January 22, 1986. See *Delaware v. Van Arsdale*, 38 Cr.L. 4167. In that case the accused was deprived of his right to cross-examine a witness about a plea bargain into which the witness entered where certain criminal charges would be dropped if he cooperated with the prosecution. Even though the witness's

testimony did not touch on matters that were in much dispute, the Delaware Supreme Court held the limitation of the accused's constitutional right of confrontation to be error per se dictating a reversal because the trial court had forbidden any inquiry on the subject. See *Van Arsdale v. State*, 486 A.2d 1 (Del.S.Ct. 1984). The issue before this Court is whether such error is prejudicial per se or must harm be shown before a reversal occurs. Petitioner would submit that if *Van Arsdale* is upheld, then the failure to permit this petitioner to show bias should cause the granting of this writ and the subsequent reversal of the conviction. Even if it is held in *Van Arsdale* that harm must be shown, the above discussion shows that harm was shown by the petitioner in this case.

Finally, the Fifth Circuit's position that relevant civil litigation may be excluded as confusing is contrary to opinions on the subject in the District of Columbia Circuit. *See Villaroman v. United States*, 184 F.2d 261 (D.C. Cir. 1950) and *United States v. Robinson*, 530 F.2d 1076 (D.C. Cir. 1976), which held that the pendency of a civil action by a prosecution witness based on the allegations in the indictment is a proper subject of inquiry because the jury has a right to consider the interest which the witness may have in the result of the litigation.

B. Exclusion of Evidence Showing That Petitioner Had Not Been Terminated

Petitioner sought to prove that he had never been lawfully terminated by Allied Fidelity Insurance Company. In attempting to present this defense, he sought to prove that a change in the by-laws of Allied in 1981 prevented any corporate officer or employee except the president from terminating an agent in appellant's position. Appellant's evidence on this defensive theory were the corporate by-laws in effect from 1972 to 1981, the 1981 and 1983

amended by-laws, and the testimony of an expert that the corporate by-laws in effect after 1981 required the president of corporation to terminate appellant. The trial court excluded the proffered testimony.

Although a trial court is vested with wide discretion in determining whether evidence is relevant or irrelevant, such discretion does not extend to the exclusion of relevant evidence necessary to establish a valid defense. *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. 1981), aff'd. on retrial, 700 F.2d 663 (5th Cir. 1983).[2] As stated earlier in this petition the accused in a criminal case has the Sixth Amendment right to present his defense to the allegations in the indictment. *In re Oliver*, 333 U.S. 257, 273 (1943).

If the petitioner had not been terminated, then he could not have made a false statement, since one essential element of an 18 U.S. §1001 violation is that the statement be false. The trial court's exclusion of this evidence because it was confusing can only mean that evidence to support a plea of not guilty is no longer relevant in the rush to convict the accused. If the Sixth Amendment's right to present a defense is still in existence, then peti-

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[2] In *Wasman*, the accused was charged with making a false statement in a passport application. He sought to show that he used a non-Semitic name because he wanted to do business with Arabs and that under Florida law, he had a right to use any name he chose without going through formal proceedings to change his name. The circuit court held the testimony was relevant and admissible, stating:

> "It is equally clear that evidence concerning his purpose in assuming another name and the circumstances surrounding his doing so are relevant to the central contention of his defense [that no bad purpose was involved in the use of the assumed name]. *Cf United States v. Cox* [593 F.2d 46 (6th Cir. 1979)]. Whether the factual issue would have been resolved in his favor, he was certainly entitled to have his testimony on this point heard by the jury." *United States v. Wasman*, 641 F.2d at 329.

tioner should have been entitled to introduce the proffered testimony.

C. The Exclusion of the Defensive Testimony That Petitioner Continued to Rely Upon the Advice of His Counsel

The government's theory of prosecution was that petitioner willfully made false statements from June 1, 1982 through August 27, 1982. Petitioner attempted to prove that he relied upon the advice of counsel from May 6, 1982 through August 27, 1982, but the trial court limited the testimony to the advice given on May 6, 1982.[3] Testimony concerning the accused's state of mind at the time of the offense must necessarily be relevant, and its exclusion only can lead to the conclusion that the petitioner has been deprived of his right to defend himself as guaranteed by the Sixth Amendment.

In effect, the trial court permitted the government to offer evidence showing guilt from May, 1982 to August, 1982, but the petitioner was limited to defend only as of May, 1982. Surely, an accused's right to his day in court means more than offering testimony on half of what the government seeks to prove. See *In re Oliver*, 333 U.S. 257 (1948).

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[3] The trial court refused the proferred testimony, stating:

> THE COURT: Well, I think you got his legal opinion in. We can be here two or three days determining whether circumstances have changed or not in the intervening time that he later reaffirmed the same facts."

CONCLUSION

The decision below presents an issue of major importance which should be decided by this Court. Further, the decision below with reference to the offer of testimony to show bias conflicts with the decisions of the District of Columbia circuit, and may be controlled by this Court's opinion in *Delaware v. Von Arsdale*, _U.S. _5 S.Ct. 465 (1985), currently pending before this Count.

Petitioner, Robert Blake McCallum, respectfully prays that writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 23, 1985.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to the counsel listed below:

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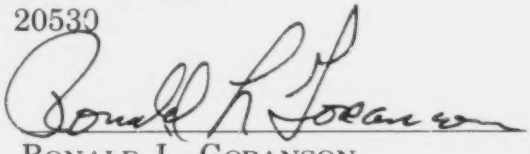

RONALD L. GORANSON

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE
United States
Court of Appeals
FOR THE FIFTH CIRCUIT

No. 85 — 1362

UNITED STATES OF AMERICA,
Plaintiff — Appellee,

versus

ROBERT BLAKE McCALLUM,
Defendant — Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(December 23, 1985)

Before POLITZ, HIGGINBOTHAM, and JONES, Circuit Judges.

POLITZ, Circuit Judge:[1]

Convicted of 27 counts of knowingly and willfully making false statements in violation of 18 U.S.C. §1001, Robert Blake McCallum appeals, challenging evidentiary rulings and the jury charge. Finding no error, we affirm.

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[1] Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

FACTS

McCallum was a bail bondsman in Dallas, Texas. On May 4, 1982, he was empowered by Allied Fidelity Insurance Company to post bonds on its behalf and was given 462 powers-of-attorney. Two days later, Allied's vice-president who had contracted with McCallum, in writing revoked that authority. On May 6, 1982, Allied's regional manager for Texas personally visited McCallum, advised that the agency agreement had been revoked, and demanded the return of all powers-of-attorney. McCallum demurred. The regional manager personally advised the Dallas County Sheriff's Office that McCallum was not authorized to act on behalf of Allied. On May 19, Allied's counsel wrote McCallum, demanding a return of all powers-of-attorney. Notice of the agency revocation was not given to any federal agency or court until August 30, 1982.

From June 1 through August 27, 1982, McCallum represented himself as Allied's agent and signed and presented to the United States District Court for the Northern District of Texas bonds, with attached powers-of-attorney, to secure the appearance of persons charged with immigration law violations. These filings undergird the 27 counts for making, and causing to be made, false and fraudulent statements and representations concerning material facts to a government agency or department.

McCallum's primary defense was that he did not act willfully because he relied on the advice of his attorney, Randy Taylor. Taylor testified that on May 7, 1982, he reviewed the agreement between McCallum and Allied, a letter of underwriting authority from Allied to McCallum, and other documents, and then advised McCallum that he could continue writing bonds on Allied until Allied's pres-

ident revoked his authority in writing. McCallum asserted that he wrote the 27 challenged bonds based on this advice.

The government's case was based primarily on the testimony of three witnesses, Allied's vice-president who testified that he hired and fired McCallum, exercising authority granted by Allied's president; the regional manager who testified that he gave McCallum oral notice of termination and demanded the return of all powers-of-attorney; and Allied's president who testified that in accordance with his authority he had delegated to the vice-president the power to grant and terminate bail bonding authority.

The district judge identified three elements of the offense in his charge to the jury:

> First: That the Defendant knowingly made a false statement, or made or used a false document, in relation to a matter within the jurisdiction of a department or agency of the United States as charged;
>
> Second: That the false statement or false document related to a material matter; and
>
> Third: That the Defendant acted wilfully and with knowledge of the falsity.

Respecting McCallum's main defense theory, the court instructed:

> With regard to the elements of wilful and knowing wrongdoing, the defense introduced evidence that the Defendant acted on the basis of advice from his attorney.
>
> If the Defendant, before taking any action, sought the advice of an attorney whom he consid-

> ered competent, in good faith and for the purpose of securing legal advice on the lawfulness of his possible future conduct, and made a full and accurate report to his attorney of all of the material facts of which he has the means of knowledge, and acted strictly in accordance with the advice of his attorney given following his full report, then the Defendant would not be wilfully doing something the law forbids. . . .

McCallum received 26 concurrent five-year sentences plus five years of probation and a $10,000 fine on the 27th count.

ANALYSIS

Evidentiary Issues

1. Civil Litigation.

McCallum sought to introduce evidence that the INS had filed suit against Allied to collect on several forfeited bonds which McCallum had signed. The evidence was offered to impeach the testimony of Allied's officers, impugning their motivation for testifying that McCallum was without authority to bind their company. The district court noted that this evidence might show possible prejudice by Allied's officers, but that this possibility was "far outweighed under Rule 403 by confusing the jury on a matter that really is not relevant. . . .I don't want to get off and have to instruct them on what is involved in civil litigation of this kind."

The admissibility of evidence for impeachment purposes is committed to the broad discretion of the trial judge. We perceive no abuse of the discretion. *United States v. Landers*, 704 F.2d 152 (5th Cir.) *cert. denied*, 464 U.S. 856 (1983).

2. Taylor's Testimony.

McCallum assigns three errors arising out of the testimony of Randy Taylor who testified about his interview, document review, and legal advice to McCallum on May 7, 1982, regarding the bond writing. After Taylor completed his testimony, McCallum's trial counsel sought to return him to the stand to testify about continuing advice he gave McCallum after May 7, 1982. The trial judge refused to permit the recall of Taylor on the grounds that the evidence was both cumulative and irrelevant. We find no evidence presented by the government suggesting any change in McCallum's state of mind between May 7, 1982 and August 27, 1982, the date of the last bond filing. The government's case was straightforward. The defense was equally straightforward. Evidence of McCallum's reliance on advice of counsel was presented by the defense. We find no abuse of discretion in the trial judge's disallowance of the recall of Taylor. Our attention is invited to no relevant evidence that was excluded.

McCallum contends that that trial judge erred in refusing to allow Taylor to testify about statements he made to Taylor prior to and during the course of their May 7, 1982 conference. McCallum offered the statements for the truth of their content under Fed.R.Evid. 803(3). The court allowed the hearsay statements not as assertion of a fact but as fact of an assertion, specifically, "as a predicate for what action was then taken by Mr. Taylor." The court so charged the jury. There was no error in this ruling.

In addition McCallum maintains that the court violated his sixth amendment right to confrontation by excluding Taylor's testimony about his unsuccessful attempt in September 1982 to deliver Allied's portion of the bail bond premium to local counsel. Allied's regional manager had testified that Allied had no record of any premiums hav-

ing been remitted by McCallum. The sixth amendment is not implicated. The real issue is whether the court erred in excluding evidence to contradict the regional manager's statement which defense counsel had not challenged on cross. *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). No payments had been made. The district court excluded testimony concerning that attorney's action after the alleged criminal conduct had occurred as irrelevant and tending to confuse the jury because the attorney acted on behalf of McCallum after McCallum "got his tail in the wringer." We find no abuse of discretion in that ruling and will not reverse it. *United State v. Kimmel*, ____ F.2d ____, slip op. 1373 (5th cir. 1985).

3. Allied's Bylaws.

The bylaws of Allied that were in effect during all times pertinent to the indicment, May-August 1982, were admitted into evidence. McCallum sought to buttress his defense that he had authority to write bonds on Allied by offering copies of Allied's bylaws in effect from 1972 through April 1982. The district court excluded the earlier bylaws as irrelevant to McCallum's defense because neither he nor Taylor was aware of the contents of those bylaws during the pertient period of May-August 1982. Information not known by McCallum, or even his attorney, could not affect his lack of willfulness defense. There was no error in this ruling. The same applies to the court's refusal to permit McCallum to introduce the testimony of an attorney about the legal consequences of a 1981 amendment to the bylaws involving termination of agency relationship. That which was not known could not be relevant to McCallum's state of mind.

Jury Charge

McCallum requested an instruction that if "the power

of attorney was not properly and lawfully revoked by Allied . . ., then you will return a verdict of not guilty on each count." Considering the entirety of the charge we find no error in the refusal of this instruction. The court defined a false statement or document as one "made or used if it is untrue and is then known to be untrue," and instructed the jury "i!f you find that the accused did not knowingly and wilfully make a false statement as alleged, you should acquit." If the powers were not in fact revoked there would have been no false representation. The essence, if not exact wording, of the requested charge was given. The court is not obliged to use the defendant's requested language. The court is to fairly and adequately instruct the jury on its functions, the elements of the offense involved, and the defense theories supported by the evidence. *United States v. Schmitt*, 748 F.2d 249 (5th Cir. 1984); *United States v. Fowler*, 735 F.2d 823 (5th Cir. 1984); *see also United States v. Chavis*, 772 F.2d 100 (5th Cir. 1985). The court *a quo* did so. The claim is without merit.

McCallum finally argues that the district court erred by submitting to the jury offenses not contained in the indictment. McCallum was indicted for making false statements. The jury charge as given tracked the language of 18 U.S.C. §1001, permitting a conviction for the making of false statements or the use of false documents. The charge as given to the jury provides no grounds for reversal. *Citing United States v. Beacon Brass*, 344 U.S. 43 (1952), we have held that under 18 U.S.C. 1001 "there is no distinction between oral and written statements." *United States v. Massey*, 550 F.2d 300, 305 (5th Cir. 1977). Indeed, the proscribed statements may be " 'oral as well as written . . . and unsworn as well as sworn.'" *Id.*, *citing United States v. Krause*, 507 F.2d 113, 117 (5th Cir. 1975). When McCallum presented himself as an agent for

Allied, authorized to bind Allied on bail bonds, and when he executed and submitted each bond to the clerk of court, he made a statement within the meaning and intendment of 18 U.S.C. §1001.

The government's case and McCallum's defense stood in stark and certain contrast. In convicting on all counts the jury obviously rejected McCallum's defense. An abundance of evidence supports the verdict. The convictions are AFFIRMED.

APPENDIX B

ORDER DENYING MOTION FOR REHEARING

IN THE
United States
Court of Appeals
FOR THE FIFTH CIRCUIT

No. 85 — 1362

UNITED STATES OF AMERICA,
Plaintiff — Appellee,

versus

ROBERT BLAKE McCALLUM,
Defendant — Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(January 23, 1986)

Before POLITZ, HIGGINBOTHAM, AND JONES, Circuit Judges.

Per Curiam:

IT IS ORDERED that the petition for rehearing filed in the above entitiled and numbered cause be and is hereby denied.

ENTERED FOR THE COURT:

(s) HENRY A. POLITZ
UNITED STATES CIRCUIT JUDGE